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CITATIONS

In the Supreme Court of the United States

OCTOBER TERM, 1960

No.

WILLIAM P. ROGERS, ATTORNEY GENERAL OF THE UNITED STATES, APPELLANT

v.

FRANCISCO MENDOZA-MARTINEZ

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF CALIFORNIA, NORTHERN DIVISION

JURISDICTIONAL STATEMENT

OPINION BELOW

The memorandum opinion of the District Court holding Section 401(j) of the Nationality Act of 1940, as amended, unconstitutional, is set forth in the Appendix, *infra,* pp. 7–15. The court's findings of fact and conclusions of law are also set forth in the Appendix, *infra,* pp. 16–19.

JURISDICTION

The judgment of the District Court declaring petitioner to be a citizen of the United States, for the reason that Section 401(j) of the Nationality Act of 1940, as amended, is unconstitutional, was entered on October 19, 1960. Appendix, *infra,* p. 20. A notice of appeal to this Court was filed in the Dis-

trict Court on November 4, 1960. The jurisdiction of this Court to review on direct appeal the decision of a District Court holding an act of Congress unconstitutional is conferred by 28 U.S.C. 1252.

QUESTION PRESENTED

Whether Congress had the constitutional power to provide, as it did in Section 401(j) of the Nationality Act of 1940, for the expatriation of a native-born citizen who, in time of war, voluntarily remained outside the jurisdiction of the United States for the purpose of evading or avoiding service in the armed forces of the United States.

STATUTE INVOLVED

The Nationality Act of 1940 (54 Stat. 1137), as amended by the Acts of January 20, 1944 (58 Stat. 4), July 1, 1944 (58 Stat. 677), and September 27, 1944 (58 Stat. 746), provided in pertinent part:

> Section 401. A person who is a national of the United States, whether by birth or naturalization, shall lose his nationality by:
>
> * * * * *
>
> (j) Departing from or remaining outside of the jurisdiction of the United States in time of war or during a period declared by the President to be a period of national emergency for the purpose of evading or avoiding training and service in the land or naval forces of the United States.[1]

[1] Now incorporated into Section 349 of the Immigration and Nationality Act of 1952, 66 Stat. 163, 267-268, 8 U.S.C. 1481.

STATEMENT

On April 18, 1960, the Court remanded this case to the District Court to determine whether appellee's conviction for draft evasion on June 23, 1947, after the adoption of Section 401(j) of the Nationality Act of 1940, as amended, necessarily involved an adjudication that he was a citizen of the United States, thus foreclosing, under the doctrine of collateral estoppel, his denationalization (362 U.S. 384).[2] On remand, the District Court, after allowing the parties to amend their pleadings, considered this question. It found collateral estoppel inapplicable to this case, and therefore was compelled again to reach the constitutional issue; it adhered to its former decision that Section 401(j) was unconstitutional. Appendix, *infra*, pp. 10–15.

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[2] The prior history of the case is as follows:

On September 6, 1955, the District Court for the Southern District of California, Northern Division, issued a Memorandum and Order rejecting appellee's claim, brought under Section 503 of the Nationality Act of 1940, that he is a citizen of the United States since Section 401(j) is unconstitutional. In a *per curiam* opinion, rendered on November 2, 1956, the Court of Appeals for the Ninth Circuit affirmed (238 F. 2d 239). On December 12, 1956, a petition for a writ of certiorari was filed (No. 623, O.T. 1956) and on April 7, 1958, this Court (356 U.S. 258) granted the petition (No. 54, O.T. 1957), and vacated the judgment of the Ninth Circuit for reconsideration in the light of *Trop* v. *Dulles*, 356 U.S. 86. Upon reconsideration, the District Court entered a judgment holding Section 401(j) unconstitutional (October 20, 1958) and on March 9, 1959, this Court noted jurisdiction of the government's appeal (359 U.S. 933). The case was then briefed and argued on the issue of constitutionality. The Court raised the issue of collateral estoppel *sua sponte*, after argument.

The facts upon which this holding of unconstitutionality was based are substantially the same as those before the Court at the last term; these facts were stipulated by the parties and were again found by the district judge in his memorandum and order (Appendix, *infra*, pp. 8–10), and his findings of fact (Appendix *infra*, pp. 16–18), after the remand ordered in 362 U.S. 384.[3] They are as follows: That appellee was born in the United States on March 3, 1922, and was a citizen of the United States by birth; that he was also, and had been ever since birth, a citizen and national of Mexico under the laws of that country; that he resided in the United States continuously from his birth until 1942; that during 1942 he departed the United States and went to Mexico for the sole purpose of evading and avoiding training and service in the Armed Forces of the United States; that he remained in Mexico continuously from 1942 until on or about November 1, 1946, for that sole purpose; that on June 23, 1947, upon his plea of guilty in the United States District Court for the Southern District of California, appellee was convicted of violating Section 11 of the Selective Service and Training Act of 1940, and was sentenced to imprisonment for a period of one year and a day, and served that sentence; that on February 3, 1953, appellee was served with a warrant of arrest on deportation proceedings; that a hearing was held on May 25, 1953, before a Special Inquiry Officer who, on September 11, 1953, ordered appellee deported from the United States as an alien; and that on October 23,

[3] No new evidence bearing on the issue of constitutionality was introduced at the hearing after the remand.

1953, the Board of Immigration Appeals dismissed appellee's appeal.

THE QUESTION IS SUBSTANTIAL

In its present posture, this case directly raises the issue of the validity of Section 401(j) of the Nationality Act of 1940, as to which the Court has twice granted certiorari for a hearing on the merits (*Gonzales* v. *Landon*, 349 U.S. 943, 350 U.S. 920; *Perez* v. *Brownell*, 352 U.S. 908, 356 U.S. 44) and noted probable jurisdiction in this case on the prior appeal (*Mackey* v. *Mendoza-Martinez*, 359 U.S. 933, 362 U.S. 384). The Court has four times heard argument on this question.[4] It is plain that the problem of whether Congress has constitutional power to provide for loss of nationality for leaving the country in order to evade military service during a period of war or national emergency still warrants resolution by this Court, and the issue is now posed in clearest form in this case. In addition, the same issue (as it involves the validity of Section 349(a)(10) of the Immigration and Nationality Act of 1952, the successor provision of Section 401(j) of the Nationality Act of 1940) is presented in the companion case of *Herter* v. *Cort*, in which the government has also noted an appeal to this Court and is simultaneously filing its jurisdictional statement. The considerations supporting the validity of the statute, and demonstrating that the question on the merits is substantial, are discussed in the government's brief on the merits on the prior appeal in this case (No. 29, Oct. Term 1959).

[4] In *Gonzales*, twice in *Perez*, and in the prior appeal in the instant case.

CONCLUSION

It is respectfully submitted that the Court should note jurisdiction of this appeal.

J. LEE RANKIN,
Solicitor General.

MALCOLM RICHARD WILKEY,
Assistant Attorney General.

BEATRICE ROSENBERG,
JEROME M. FEIT,
Attorneys.

DECEMBER 1960.

APPENDIX

UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF CALIFORNIA, NORTHERN DIVISION

No. 1314–ND

FRANCISCO MENDOZA-MARTINEZ, PLAINTIFF, *vs.* WILLIAM P. ROGERS, ATTORNEY GENERAL OF THE UNITED STATES, DEFENDANT

MEMORANDUM AND ORDER

The above cause is before the court for the third time. On the 22nd day of September 1955, this court entered judgment which adjudged and decreed that plaintiff lost his United States citizenship and nationality through expatriation by remaining outside the jurisdiction of the United States after September 27, 1944, in time of war and during a period declared by the President of the United States to be a period of national emergency, for the purpose of evading and avoiding training and service in the land and naval forces of the United States. On April 7, 1957 the Supreme Court of the United States vacated the judgment, and remanded the cause "to the United States District Court for determination in light of *Trop* v. *Dulles,* ante, p. 86, decided March 31, 1958". 356 U.S. 258.

Pursuant to the order of the Supreme Court a hearing was held before this court on July 10, 1958.

At the hearing held on July 10, 1958, the only issue presented to the court for determination was an issue

of law which the parties posed as follows: Is Section 401(j) of the Nationality Act of 1940 (54 Stat. 1137) unconstitutional, either on its face or as applied to plaintiff? The issue of law to be determined was submitted to the court on a written trial stipulation wherein the parties stipulated:

1. That plaintiff was born in the United States on March 3, 1922, and thus was a citizen of the United States by birth;

2. Under the laws of the Republic of Mexico plaintiff was then and ever since his birth had been a citizen and national of the Republic of Mexico;

3. During 1942 plaintiff departed from the United States and went to Mexico for the sole purpose of evading and avoiding training and service in the armed forces of the United States;

4. Plaintiff remained in Mexico continuously from some time during 1942 until on or about November 1, 1946, for the sole purpose of evading and avoiding training and service in the armed forces of the United States;

5. On June 23, 1947, plaintiff upon his plea of guilty was convicted in the United States District Court for the Southern District of California for violation of Section 11 of the Selective Service and Training Act of 1940, and he was sentenced to imprisonment for a period of one year and one day;

6. On February 3, 1953, a warrant of arrest in deportation proceedings was served upon plaintiff. Pursuant to this warrant a deportation hearing was held on May 25, 1953, and on September 11, 1953, the special inquiry officer who presided at the hearing rendered his decision ordering that plaintiff be deported from the United States as an alien; and

7. Plaintiff appealed the decision of the special inquiry officer to the Board of Immigration Appeals,

Department of Justice, and on October 23, 1953 said Board dismissed plaintiff's appeal.

Following the hearing, and on September 24, 1958 this court filed its memorandum and order holding unconstitutional Section 401(j), and on October 21, 1958, findings of fact, conclusions of law and judgment of law were entered accordingly.

On a direct appeal to the Supreme Court of the United States, the cause was on April 18, 1960 again remanded to this court "with permission to the parties to amend the pleadings, if they so desire, to put in issue the question of collateral estoppel, and to obtain an adjudication upon it." 362 U.S. 384 at 387.

On or about June 30, 1960 plaintiff filed a second amended complaint raising the issue of collateral estoppel. The allegations of the second amended complaint in this respect are that in the year 1947 plaintiff was indicted for draft evasion, in violation of the Selective Service and Training Act of 1940; that plaintiff was adjudged guilty of the first count of the indictment and sentenced to imprisonment for one year and one day, and that under said judgment and commitment plaintiff was in fact imprisoned for the term therein provided. Copies of the indictment and of the judgment and commitment are attached as exhibits. In its answer the defendant admitted the foregoing allegations, except that it denied, for lack of information and belief, the allegation that plaintiff was in fact imprisoned for the term provided under the judgment and commitment.

Following the filing of the amended pleadings, there was filed herein an amended trial stipulation, which is identical to the trial stipulation previously mentioned except there is added the fact that plaintiff resided in the United States from the date of his birth up to the time of his departure from the United States to Mexico in 1947, (sic) and that the action may be dismissed as to the defendant Argyle R.

Mackey, the Commissioner of Immigration and Naturalization.

Under the amended trial stipulation there are no issues of fact to be tried, and the issues of law to be determined are posed in the following form:

ISSUES OF LAW

1. Is the defendant herein estopped by reason of the indictment and conviction of plaintiff for violation of Section 11 of the Selective Service and Training Act of 1940, as amended (U.S.C. Title 50 of Appendix, Section 311) from denying plaintiff is now a national and citizen of the United States?

2. Is Section 401(j) of the Nationality Act of 1940, as amended, unconstitutional, either on its face, or as applied to the plaintiff herein?

Pursuant to the order of the Supreme Court, a hearing was held on August 23, 1960. The plaintiff was represented by DiGiorgio & Davis, Thomas R. Davis appearing. The defendant was represented by Laughlin E. Waters, United States Attorney, James R. Rooley, Assistant United States Attorney, appearing. Neither party offered the testimony of any witness. There was received in evidence as Plaintiff's Exhibits A and B respectively a copy of the indictment and a copy of the judgment and commitment. Following oral arguments and the filing of additional legal memoranda the cause was submitted to the court for its decision upon the trial stipulation, the records and files and the above mentioned exhibits.

The indictment is in three counts. Count one, to which the plaintiff pleaded guilty, after alleging that plaintiff was a "male person within the class made subject to selective service" and that he had "registered as required by said act and the regulations pro-

mulgated thereunder and became a registrant of Local Board No. 137," charged that "on or about November 15, 1942, in violation of the provisions of said act and the regulations promulgated thereunder, the defendant did knowingly evade service in the land or naval forces of the United States of America in that he did knowingly depart from the United States and go to a foreign country, namely: Mexico, for the purpose of evading service in the land or naval forces of the United States and did there remain until on or about November 1, 1946."

Count two of the indictment charged plaintiff with failure to report for induction on December 11, 1942, as ordered. Count three charged plaintiff with failure to keep the draft board advised of the address where mail would reach him.

The judgment and commitment dated November 23, 1947, after reciting that the defendant (plaintiff herein) had appeared in court without counsel, having been informed of his right to counsel and a jury trial and having waived the same, and having been convicted on his plea of guilty of the offense charged in the first count of the indictment, to-wit: "Having on or about November 15th 1942, knowingly departed from the United States to Mexico, for the purpose of evading service in the land or naval forces of the United States and having remained there until on or about November 1st 1946" it was ordered and adjudged that the defendant be "committed to the custody of the Attorney General or his authorized representative for imprisonment for the period of one year and one day in an institution of the penitentiary type, on the first count." The judgment and commitment also states "It is further ordered that the second and third counts be dismissed, it appearing to the court that the offenses charged therein arose out of the same circumstances."

I will first consider the issue of collateral estoppel.

It is the plaintiff's contention that while the Selective Service and Training Act of 1940, as amended, made male citizens and male persons residing in the United States, between certain ages, subject to military service, the Act did not apply to non-resident aliens; that plaintiff became a non-resident alien on September 27, 1944, the effective date of that Act, in accordance with the provisions thereof; and that when defendant in 1947 charged plaintiff with draft evasion between September 27, 1944 and November, 1946, such charge could be applicable only if plaintiff were then a citizen. From these premises plaintiff argues that when the trial court found plaintiff guilty of draft evasion during the period between September 27, 1944 and November, 1946, that the judgment of conviction necessarily included an adjudication of citizenship, and that such judgment brings into play the doctrine of collateral estoppel. In short, plaintiff contends that the judgment of conviction presupposed that plaintiff had not been denationalized under Section 401(j), and that therefore defendant is estopped to deny in this cause that plaintiff is a citizen or that he is entitled to the relief which he seeks.

It appears to be well settled that collateral estoppel may arise from a criminal proceedings to estop a party in a subsequent civil action. *Emich Motors Corp.* v. *General Motors Corp.*, 340 U.S. 558. While the parties assume in their briefs that collateral estoppel may arise from a criminal proceedings prosecuted by the United States to estop the United States in a subsequent civil action to which it is a party, I find it unnecessary to comment on such point.

Nothing appears in the record to indicate that the defendant asserted plaintiff's citizenship as a basis for his liability for induction, nor did the statute require any such assertion. The Selective Service

and Training Act of 1940, as amended, provided in Section 3(a) that all male persons residing in the United States, as well as all male citizens, whether residing in the United States or not, were subject to the draft. 50 U.S.C. Appendix 303 (1940 edition, Supplement 1). In 1942 plaintiff was a male citizen within the class made subject to selective service, a class which comprised both citizens and non-citizens. Plaintiff, therefore, as a male person residing in the United States in 1942 was liable for induction irrespective of whether he was a citizen or simply a resident of the United States. Furthermore, it appears from the indictment that plaintiff was ordered to report for induction on December 11, 1942. The count of the indictment to which the plaintiff pleaded guilty necessarily included the failure to obey that order. In 1942, therefore, plaintiff as a male person within the class made subject to selective service was liable for induction whether he was a citizen or a resident alien. If either a male citizen or a male resident of the United States departed from the United States during war for the purpose of evading service, he would be subject to prosecution for draft evasion upon his return to this country. The gist of the crime charged to which plaintiff pleaded guilty was evasion by leaving the country in 1942. In my view the further language of count one, reading "and did there (Mexico) remain until on or about November 1, 1946," is immaterial and is to be treated as mere surplusage. In his brief plaintiff states that he "invokes no more technical defense. He relies on a determination by the original trial judge on the basis of which he actually suffered punishment. If the trial court had found that the extent of his offense was from 1942 to 1944, instead of 1942 to 1946, it seems an inevitable inference that the penalty imposed would have been mitigated accordingly." I

find nothing in the record to support any inference that the trial judge increased the punishment which would have otherwise been imposed absent the fact that plaintiff remained in Mexico after September 27, 1944. This is particularly true when considered in the light of the trial judge's statement in dismissing counts two and three, and the fact that the trial judge could have imposed punishment by "imprisonment for not more than five years or a fine of not more than $10,000, or by both such fine and imprisonment."

It is my conclusion that the prior criminal proceedings against plaintiff did not necessarily or in actual fact make any determination as to plaintiff's citizenship and, therefore, the doctrine of collateral estoppel is not applicable.

In respect to the question posed "Is Section 401(j) unconstitutional, either on its face or as applied to the plaintiff?" I reaffirm the views expressed in my memorandum and order of September 24, 1958, which followed the second hearing on July 10, 1958. In addition, following further study of the several views expressed by the members of the Supreme Court of the United States in *Trop* v. *Dulles*, 356 U.S. 86, and *Perez* v. *Brownell*, 356 U.S. 44, I desire to add the following paragraph:

The *Trop* case did not involve Section 401(j), but involved Section 401(g) of that Act, which provides that a citizen shall lose his nationality "by deserting the military or naval forces of the United States in time of war, provided he is convicted thereof by a court martial and as a result of such conviction is dismissed or dishonorably discharged from the service of such military or naval forces; * * *." The *Perez* case involved Section 401(e) of the Act, which provides that a person who is a national of the United States, whether by birth or naturalization, shall lose his nationality by: "* * * Voting in a political elec-

tion in a foreign state or participating in an election or plebiscite to determine the sovereignty over foreign territory. * * *" In addition to the views expressed in my memorandum and order of September 24, 1958, I construe Section 401(j), which provides for automatic divestiture of citizenship, as essentially penal in character and deprives the plaintiff of procedural due process. In my view the requirements of procedural due process are not satisfied by the administrative hearing of the Immigration Service nor in this present proceedings.

Pursuant to the stipulation of the parties, the action may be dismissed as to the defendant Argyle R. Mackey, the Commissioner of Immigration and Naturalization.

The plaintiff is entitled to the relief sought. Counsel for the plaintiff is directed to prepare and lodge proposed findings of fact, conclusions of law and form of judgment consistent with the views herein expressed.

The Clerk of this Court is directed to forthwith mail copies of this memorandum to all counsel.

Dated: September 22, 1960.

GILBERT H. JERTBERG,
District Judge.

UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF CALIFORNIA, NORTHERN DIVISION

No. 1314–ND

FRANCISCO MENDOZA-MARTINEZ, PLAINTIFF, *vs.* WILLIAM P. ROGERS, ATTORNEY GENERAL OF THE UNITED STATES, DEFENDANT

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND JUDGMENT

The above entitled cause having come on regularly for hearing on the 23rd day of August 1960, before the Honorable Gilbert H. Jertberg, Judge Presiding without a jury, the plaintiff being represented by his attorneys, Di Giorgio and Davis, by Thomas R. Davis, and the defendant being represented by his attorney, Laughlin E. Waters, United States Attorney, Richard A. Lavine and James R. Dooley, Assistant United States Attorneys, by James R. Dooley; and the facts having been submitted by written stipulation and written memoranda having been submitted, and documentary evidence having been submitted by the plaintiff and oral argument having been heard; and the Court having taken the cause under submission and being fully advised in the premises, now makes the following Findings of Fact and Conclusions of Law:

FINDINGS OF FACT

I

The plaintiff, Francisco Mendoza-Martinez, is a resident of the City of Delano, County of Kern, State of California, and is within the jurisdiction of this Court.

II

The defendant, William P. Rogers, is the duly appointed, qualified and acting Attorney General of the United States, and as such is the head of the Department of Justice.

III

Plaintiff was born in the United States on March 3, 1922, and thus was a citizen and national of the United States at birth.

IV

The father and mother of the plaintiff were at the time of the birth of the plaintiff citizens and nationals of Mexico; under the Constitution and Laws of Mexico plaintiff is now and ever since his birth has been a citizen of the Republic of Mexico by virtue of his parentage and without regard to his place of birth; the foregoing finding is intended to be solely and exclusively a recitation as to the law of Mexico according to its Constitution and Statutes and it is not intended to carry with it any other or broader connotation.

V

During 1942 plaintiff departed from the United States and went to Mexico for the sole purpose of evading and avoiding training and service in the Armed Forces of the United States.

VI

Plaintiff had resided in the United States from the date of his birth up to the time of his departure from the United States as set forth in Finding of Fact V above.

VII

Plaintiff remained in Mexico continuously from sometime during 1942 until on or about November 1, 1946 for the sole purpose of evading and avoiding training and service in the Armed Forces of the United States.

VIII

On June 23, 1947, plaintiff, upon his plea of guilty, was convicted in the United States District Court for the Southern District of California, Northern Division, for violation of Section 11 of the Selective Training and Service Act of 1940, as amended; plaintiff's Exhibits A and B, being respectively a copy of the indictment and of the Judgment and Commitment, are true and correct copies of the original documents.

IX

Plaintiff was sentenced to imprisonment for a period of one year and one day and thereafter served said sentence.

X

On February 3, 1953, a warrant of arrest in deportation proceedings was served upon the plaintiff. Pursuant to this warrant, a deportion hearing was held on May 25, 1953; and on September 11, 1953, the special inquiry officer who presided at the hearing rendered his decision, ordering that plaintiff be deported from the United States as an alien.

XI

Plaintiff appealed the decision of the special inquiry officer to the Board of Immigration Appeals, United States Department of Justice, and on October 23, 1953, said Board dismissed plaintiff's appeal.

CONCLUSIONS OF LAW

I

This Court has jurisdiction over the subject matter of the within action under the provisions of Section 360(a) of the Immigration and Nationality Act, 66 Stat. 273, 8 U.S.C.A. Sec. 1503(a).

II

Argyle R. Mackey, The Commissioner of Immigration and Naturalization is not a proper party to the within action, and the action as to him should be dismissed.

III

The defendant is not estopped, by virtue of the criminal indictment and conviction of the plaintiff for draft evasion, or for any other reason, from asserting that the plaintiff has lost his United States nationality and citizenship under the terms and provisions of Section 401(j) of the Nationality Act of 1940, a 1944 Amendment.

IV

Section 401(j) of the Nationality Act of 1940, a 1944 Amendment, under which defendant claims the plaintiff lost his United States nationality and citizenship, is unconstitutional, both on its face and as applied to the plaintiff herein.

V

The plaintiff is now, and ever since the date of his birth has been, a national and citizen of the United States; and judgment should be entered accordingly.

JUDGMENT

In accordance with the foregoing Findings of Fact and Conclusions of Law, IT IS ORDERED, ADJUDGED, AND DECREED:

1. That the within action be, and the same is hereby dismissed as to the defendant, Argyle R. Mackey, The Commissioner of Immigration and Naturalization, only;

2. That Section 401(j) of the Nationality Act of 1940, a 1944 Amendment, is unconstitutional both on its face and as applied to the plaintiff herein;

3. That the plaintiff is now, and ever since the date of his birth has been, a national and citizen of the United States.

Dated: This 18th day of October, 1960.

GILBERT H. JERTBERG,
Judge of the United States District Court.

U.S. GOVERNMENT PRINTING OFFICE: 1960